83-249

NO. 83-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILMA EVERITT, ET AL.,
Petitioners

v.

THE CITY OF MARSHALL, TEXAS, ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court's denial of plantiffs' motion for class certification, in view of the overwhelming evidence of disparate treatment of blacks in: (a) termination and discharge rate, (b) turn-over rate, (c) departmental hiring rate, (d) departmental employment rate, (e) hiring by job category, (f) employment by job category, and (g) payment rate of blacks, constitute an abuse of discretion according to the standards set out by the Federal Rules of Civil Procedure thus entitling petitioners to reversal rather than affirmation of the trial court's decision?

2. Does the Fifth Circuit Court of Appeal's reasoning that denial of class certification was proper, in light of the trial Court's holding that Ms. Everitt was discharged for cause, conflict with this Court's mandate in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980)?

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PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, Wilma Everitt, individually and in her representative capacity as representative of the class of past, present, and prospective black employees of the City of Marshall, Texas, respectfully submits this Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court's denial of plantiffs' motion for class certification, in view of the overwhelming evidence of disparate treatment of blacks in: (a) termination and discharge rate, (b) turn-over rate, (c) departmental hiring rate, (d) departmental employment rate, (e) hiring by job category, (f) employment by job category, and (g) payment rate of blacks, constitute an abuse of discretion according to the standards set out by the Federal Rules of Civil Procedure thus entitling petitioners to reversal rather than affirmation of the trial court's decision?

2. Does the Fifth Circuit Court of Appeal's reasoning that denial of class certification was proper, in light of the trial Court's holding that Ms. Everitt was discharged for cause, conflict with this Court's mandate in *United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980)?

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OPINIONS BELOW

The order of the United States District Court for the Eastern District of Texas denying plaintiffs' first and second motions for class certification is reproduced in Appendixes A and B, respectively, to the petition for Writ of Certiorari. The Opinion of the panel of the Court of Appeals affirming the dismissal of petitioner's individual claim and the denial of class certification is reported at 703 F.2d 207 (5th Cir. 1983). In that Opinion, it was held that even if denial of certification was erroneous, the intervening decision as to plaintiff's individual claim is fatal to her claim on appeal that the trial court's denial of certification was an abuse of discretion.

JURISDICTION OF THIS COURT

Judgment was entered by the Court of Appeals for the Fifth Circuit on April 22, 1983. This Court's jurisdiction is invoked under 21 U.S.C. § 1254(1) because the opinion of the Court of Appeals for the Fifth Circuit conflicts with prior decisions of this Court.

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE

This case involves application of Rule 23 of the Federal Rules of Civil Procedure to litigation under Title VII of the Civil Rights Act of 1964, as it was extended by the Equal Employment Opportunity Act of 1972 to cover state and local employees, and 42 U.S.C. §§ 1981, 1983. Rule 23 states in pertinent part:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

The time for application of the aforementioned rule is set out as follows:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended, before the decision on the merits. FED. R. CIV. P. 23 (c)(1).

Title VII states in pertinent part that:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(2) (1964).

Plaintiff and members of her class also receive protection under the following laws as set out in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. § 1981 (1977).

and;

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983 (1979).

STATEMENT OF THE CASE

Petitioner filed this case as a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* alleging that the City of Marshall, Texas, discriminated in the compensation, promotion, and discharge in hiring of black employees, while countenancing the maintenance of a racially discriminatory work environment and retaliating against black employees. Petitioner moved for an order certifying the action as a class action, which was denied by the District Court after an evidentiary hearing. The District Court reasoned that questions of law or fact relating to plaintiff, a discharged civil service employee, might not be common to non-civil service employees.

Plaintiff's second motion for class certification was denied without a hearing. Subsequently, the District Court tried petitioner's individual claim. Although the District Court found plaintiff had proved a prima facie case of racial discrimination, and that members of the police department had engaged in the use of contemptuous racial language, the Court held that plaintiff's discharge was due to dereliction of duty and not motivated by discriminatory animus.

Plaintiff appealed and a panel of the Fifth Circuit affirmed the trial court's decision in both the individual and class claims. The Court held that petitioner had neither claims typical of the members of the class nor an adequate common interest or nexus with them.

REASONS FOR GRANTING THE PETITION

The Court of Appeals Decision Insulates Class Certification Denials from Review and Conflicts with Prior Opinions of this Court

The Court of Appeals affirmed the trial court's decision to deny class certification based on Ms. Everitt's failure to succeed in proving her individual case. The Court held that "... with regard to Ms. Everitt, the trial on the merits of her individual claim resulted in a determination that she herself 'was not a victim of discrimination. Even if she would have appeared to be an appropriate representative on (the date of the District Court's denial of class certification) she is not now an appropriate representative .... This defect is fatal' to her claim on appeal that the District Court's denial of certification was an abuse of its discretion." *Everitt v. City of Marshall*, 703 F.2d 207 (1983). This was error.

Failure to review denial from the proper perspective deprived petitioner of her right to review under the standards imposed by the Federal Rules of Civil Procedure, which require that the plaintiff be an appropriate class representative at the time she requests certification, without reference to the ultimate outcome of her individual case. *Huff v. N.D. Cass Company*, 485 F.2d 710 (5th Cir. 1973). Affirmation of the trial court's refusal to certify conflicts with this Court's decision in *Geraghty*, "... that an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Article III values are not undermined." *United States Parole Commission v. Geraghty*, 445 U.S. 388 at 404.

The perspective from which a review of denial of class

certification is conducted is crucial. Refusing to review the failure of a trial court to certify a class at the time of the motion for certification places an impermissible burden on the class representative by requiring success on her individual claim before the Court of Appeals will even consider whether there was an abuse of discretion in the denial of her class claim. *Huff*, 485 F.2d 710. Such perspective effectively insulates the denial of class certification from review.

Under this ruling, a district court may deny a motion for class certification and try the named plaintiff's individual case knowing that the denial of class certification will not be reviewed unless the plaintiff wins the individual case and then appeals the class case. Therefore, the court's ruling in *Everitt* gives a trial court incentive to deny individual cases in order to avoid troublesome class actions.

Plaintiff demonstrated her appropriateness as class representative when she motioned for class certification as she pled a prima facie case. Where, as in the instant case, plaintiffs' overwhelming and undisputed statistical analysis makes clear that the disparate: (1) termination and discharge rate, (2) turn-over rate, (3) departmental hiring rate, (4) departmental employment rate, (5) hiring by job category, (6) employment by job category, and (7) pay rate of black employees was not likely to have been due to the operation of random factors not associated with race, and where plaintiff satisfies the other federal rule requirements, when she makes her motion for class certification, she and the class she represents are entitled to certification.

As demonstrated by her statistical evidence, plaintiff meets the federal rule requirement of numerosity. During the years 1977 through 1980, well over four hundred (400) blacks were employed by the City of Marshall, including a significant turnover of two hundred thirty-two (232) black employees of

which eighty-four (84) were terminated or discharged. She meets the requirement of commonality as employment descrimination on the basis of race was clearly demonstrated by the conclusive statistical evidence and shown not to be isolated to a single department in the city, but pervasive throughout all of the city departments. She demonstrates typicality as plaintiff's claim is founded upon discrimination based on the terms and conditions of employment on the basis of race in all departments of the City of Marshall. The Appellate Court's opinion note that, ". . . *Everitt* presents an impressive argument that the asserted racially discriminatory practices were common to both civil service and unclassified employees." *Everitt*, 703 F.2d at 210. Refusal to certify plaintiffs' class was clearly error.

This Court has recently addressed class certification in *General Telephone Company of Southwest v. Falcon*. 457 U.S. 147. The Court of Appeals class certification was reversed for reasons that do not present themselves in the instant case. While the holding in *Falcon* may appear to support the denial of certification in *Everitt*, the cases are easily distinguishable upon their facts.

In *Falcon* the trial Court certified a class without conducting an evidentiary hearing. In *Everitt* the statistical evidence of class discrimination presented on the Motion for Certification was overwhelming and uncontroverted.

The plaintiff in *Falcon* was unable to show "(1) that this discriminatory treatment is typical of Petitioner's promotion practices, (2) that Petitioners' promotion practices are motivated by a policy of ethnic discrimination that pervades Petitioner's . . . division, or that this policy of ethnic discrimination is reflected in Petitioners' other employment practices, . . . *Falcon*, 457 U.S. 147.

Falcon suggests the success of a class-based discrimination

suit depends on an analysis of statistics concerning the employer's hiring patterns. Where the unchallenged evidence shows that minority employees were hired in the numbers greater than their percentage of the labor force, claims of class-based discrimination may not be supported. *Falcon*, 457 U.S. 147 (dissenting opinion). The record in *Everitt* supports an opposite conclusion. Even though these findings were made, the holding in *Falcon* still rejects the evaluation of class certification by hindsight, 457 U.S. 151. *Falcon* supports the proposition that the perspective for evaluating the propriety of class certification is from the time of the motion for certification. In contrast to the evidence in *Falcon*, the statistics in *Everitt* are unequivocal. In light of the evidence presented in *Everitt*, the rule in *Falcon* would not preclude class certification.

Geraghty was a challenge by prisoners to the federal parole guidelines. The trial court denied the named plaintiff's Motion for Class Certification. He was released from prison, mooting his individual case. The plaintiff petitioned for review of the denial of class certification.

The Court of Appeals, ruling that the litigation was not moot, reversed the judgment of the District Court and remanded the case for further proceedings. The Appellate Court held that an erroneous denial of a class certification should not moot the issues. This Court addressed the Art. III controversies as follows:

> Mr. Justice POWELL, in his dissent, advocates a rigidly formalistic approach to Art. III, at 1216-1217, and suggests that our decision today is the Court's first departure from the formalistic view. *Post*, at 1218-1220. We agree that the issue at hand is one of first impression and thus, in that narrow sense, is "unprecedented," *post*, at 1220. We do not believe, however, that the decision constitutes a redefinition of Art. III principles or a "significant departure[e]," *post*, at 1215, from "carefully considered" precedents, *post*, at 1220.

The erosion of the strict, formalistic perception of Art. III was begun well before today's decision. For example, the protestations of the dissent are strikingly reminiscent of Mr. Justice HARLAN's dissent in *Flast v. Cohen*, 392 U.S. 83, 116, 88 S.Ct. 1942, 1960, 20 L.Ed.2d 947, in 1968. Mr. Justice HARLAN hailed the taxpayer-standing rule pronounced in that case as a "new doctrine" resting "on premises that do not withstand analysis." *Id.*, at 117, 88 S.Ct., at 1961. He felt that the problems presented by taxpayer standing "involve nothing less than the proper functioning of the federal courts, and so run to the roots of our constitutional system." *Id.*, at 116, 88 S.Ct., at 1961. The taxpayers were thought to complain as "private attorneys-general," and "[t]he interests they represent, and the rights they espouse, are bereft of any personal or proprietary coloration." *Id.*, at 119, 88 S.Ct. at 1962. Such taxpayer actions "are and must be . . 'public actions' brought to vindicate public rights." *Id.*, at 120, 88 S.Ct. at 1963.

Nothwithstanding the taxpayers' lack of a formalistic "personal stake," even Mr. Justice HARLAN felt that the case should be held nonjusticiable on purely prudential grounds. His interpretation of the cases led him to conclude that "it is . . . clear that [plaintiffs in a public action] as such are not *constitutionally* excluded from the federal courts." *Ibid.* (emphasis in original).

It is not somewhat ironic that Mr. Justice POWELL, who now seeks to explain *United Airlines, Inc. v. McDonald, supra*, as a straight-forward application of settled doctrine, *post*, at 1219, expressed in his dissent in *McDonald*, 432 U.S., at 396, 97 S.Ct., at 2471, the view that the holding rested on a fundamental misconception about the mootness of an uncertified class action after settlement of the named plaintiffs' claims? He stated:

"Pervading the Court's opinion is the assumption that the class action somehow continued after the District Court denied class status. But that assumption is supported neither by the text nor by the history of Rule 23.

To the contrary, . . . the denial of class status converts the litigation to an ordinary nonclass action." *Id.*, at 399, 97 S.Ct., at 2472.

The dissent went on to say:

"[Petitioner] argues with great force that, as a result of the settlement of their individual claims, the named plaintiffs 'could no longer appeal the denial of class' status that had occurred years earlier . . . . Although this question has not been decided by this Court, the answer on principle is clear. The settlement of an individual claim typically moots any issues associated with it. . . . This case is sharply distinguishable from cases such as *Sosna v. Iowa* . . . and *Franks v. Bowman Transp. Co.* . . . where we allowed named plaintiffs whose individual claims were moot to continue to represent their classes. In those cases, the District Courts previously had certified the classes, thus giving them 'a legal status separate from the interests[s] asserted by [the named plaintiffs].' *Sosna v. Iowa, supra,* 419 U.S. at 399, 95 S.Ct. at 557. This case presents precisely the opposite situation: The prior denial of class status had extinguished any representative capacity." *Id.*, at 400, 97 S.Ct., at 2473 (footnote omitted).

Thus, the assumption thought to be "[p]ervading the Court's opinion" in *McDonald*, and so vigorously attacked by the dissent there, is now relegated to "gratuitous" "dictum," at 1219. Mr. Justice POWELL, who finds the situation presented in the case at hand "fundamentally different" from that in *Sosna and Franks*, at 1217, also found the facts of *McDonald* "sharply distinguishable" from those previous cases. 432 U.S., at 400, 97 S.Ct. at 2472.

We do not recite these cases for the purpose of showing that our result is mandated by the precedents. We concede that the prior cases may be said to be somewhat

confusing, and that some, perhaps, are irreconcilable with others. Our point is that the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions. And, in creating each exception, the Court has looked to practicalities and prudential considerations. The resulting doctrine can be characterized, aptly, as "flexible"; it has been developed, not irresponsibly, but "with some care," at 1215, including the present case.

The dissent is correct that once exceptions are made to the formalistic interpretation of Art. III, principled distinctions and bright lines become more difficult to draw. We do not attempt to predict how far down the road the Court eventually will go toward premising jurisdiction "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case," at 1222. *Geraghty*, 100 S.Ct. at 1213 n.11.

When a class is certified it acquires a legal status separate from the interest asserted by the named plaintiff. *Sosna v. Iowa*, 419 U.S. 396 (1975). Thereafter, a case or controversy may continue to exist between the class as an entity and the defendant, and the merits of the class claim may then be adjudicated. *Geraghty*, 445 U.S. 388 (1980).

CONCLUSION

The Court of Appeals affirmed the denial of class certification based on the named plaintiff's appropriateness as class representative at the time she lost her individual case on the merits, rather than her appropriateness as class representative at the time she moved for class certification. This was error.

Affirmation is error, because the Court of Appeals incorrectly equates the named plaintiff's nexus with the pro-

posed class with the merits of her personal claim, and fails to consider whether she retained a personal stake in the outcome of the litigation after the dismissal of her individual case. By summarily affirming the trial court's decision, the Appellate Court has fashioned a rule which both effectively insulates denials of class certification from review and provides incentive to dismiss individual cases in Title VII litigation.

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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By: _____
ROBYN ELIZABETH RAY

CERTIFICATE OF SERVICE

I, Robyn Elizabeth Ray, hereby certify that a copy of the foregoing Petitioners' Application for Writ of Certiorari has been mailed certified return receipt requested to the Honorable Jason R. Searcy, 107½ W. Austin Street, P. O. Box 1386, Marshall, Texas 75670, on this the day of July, 1983.

_____
ROBYN ELIZABETH RAY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MASHALL DIVISION

WILMA EVERITT, INDIVIDUALLY AND IN BEHALF OF ALL OTHERS SIMILARLY SITUATED PERSONS	)	
vs.	)	NO. M-79-219-CA
CITY OF MARSHALL, ET AL	)	

ORDER

This is an employment discrimination suit brought by Wilma Everitt, a black female, against the City of Marshall, Texas, and various City officials, arising out of Ms. Everitt's nine month tenure as a dispatcher for the City of Marshall Police Department. Following her indefinite suspension by the Police Department for alleged dereliction of duty, Ms. Everitt appealed to the Civil Service Commission of the City of Marshall which affirmed the decision of the Police Department. She then instituted an action in state district court challenging the decision of the Civil Service Commission. *See Firemen's and Policemen's Civil Service Commission v. Hamman*, 404 S.W. 2d 308, 311 (Tex. 1966) (Plaintiff entitled to a trial de novo governed by a substantial evidence review)

In addition to pursuing her civil service remedies, Ms. Everitt filed a charge of discrimination with the Equal Employment Opportunity Commission on February 2,

1979. She alleged that she had been subjected to racial insults on September 6, 1978, when a white patrolman asked her if she had "chased any 'Niggers' lately." Ms. Everitt also alleged that she was discharged on September 23, 1978, as a result of her objections to the racial insults. Her original charge of discrimination filed with the EEOC (based solely on race) and the amendment to her charge (adding an allegation of sex discrimination) present only allegations of individual discrimination. Ms. Everitt's EEOC charge did not complain of any class wide discrimination nor could the charge be interpreted as alleging or challenging a pattern or practice of racial discrimination on the part of the City. Neither party has presented any evidence relating to the scope of the investigation conducted by the EEOC.

For matters relevant to the issue now under consideration, she alleges that she received a right to sue letter from the Department of Justice on January 7, 1980, and filed the complaint under which she is now proceeding on March 17, 1980. In her complaint, Ms. Everitt alleges that the Police Department discriminated against her and other members of the class she seeks to represent on the basis of race and sex, in violation of 42 U.S.C. §§ 1981,[1] 1983, and 2000e, *et seq.* More specifically she complains of the following employment practices and polices of the City: Discrimination in recruiting, hiring, and job assignments; unlawful terminations; allowing black employees to be harassed; retaliatory termination of minority employees who challenge discriminatory practices; and "reliance almost exclusively on reports and recommendations of other white officers, almost all of whom have been white males, in making decisions with respect to the employment status of black males and females, including, but not limited to, hiring and termination."

1 Section 1981 of Title 42 will not support a claim based on sex discrimination *Runyon v. McCrary*, 427 U.S. 160 (1976)

In addition to her individual claims, she alleges that she represents two classes of persons:

a. All black persons who are presently employed, have been employed, have made application to be employed, or who may in the future be employed or make application to be employed in the police department of Defendant the City of Marshall, Texas and who have been and continue to be or might be adversely affected by the practices and policies complained of herein; and

b. All female persons who are presently employees, have been employed, have made application to be employed, or who may in the future be employed or make application to be employed in the police department of Defendant the City of Marshall, Texas and who have been and continue to be or might be adversely affected by the practices and policies complained of herein.

In her motion for declaration of a class action and at the subsequent hearing on the motion, the claims of the class relating to sex discrimination have not been advanced. Accordingly, the gender-based class allegations need not be addressed. As quoted above, Ms. Everitt stated in her pleadings that she seeks to represent past, present and future black employees of the City of Marshall Police Department. Following extensive discovery, Plaintiff now argues that she should be allowed to represent a class of employees eccompassing all employees of the City of Marshall, including non-civil service employees. Indeed, at the class action certification hearing, almost all of the Plaintiff's evidence was directed at establishing a class of employees encompassing all of the persons who are or have been employed by the City of Marshall in all of its departments.

JURISDICTION OVER THE CLASS CLAIMS?

The Defendants question this court's jurisdiction over the class action claims in this lawsuit. It is their contention that the charges filed with the EEOC do not contain any allegations that might lead to a finding of class wide discrimination and that any class action claims in this suit are barred because they are not within the scope of the EEOC charge. There is some authority on this point. *See Fellows v. Universal Restaurants, Inc.*, Civil Action No. CA3-80-1328-F, _____F.Supp._____(N.D.Tex. June 16, 1981) (50 L.W. 2016); *EEOC v. Mallinckroot*, 22 FEP CASES 311 (E.D. Mo. 1980).

In *Fellows*, the EEOC charge filed by the plaintiff was lacking any class allegations and the EEOC investigation did not uncover any unlawful employment practice other than the claims that pertained to the plaintiff. Judge Porter concluded that to allow the plaintiff to maintain a class action suit in federal court, when there is no indication of class related unlawful employment practices in the administrative record would "sanction the 'witch hunt' condemned in Mallinckrodt." *Fellows, supra* at page 9. The *Fellows* decision traces the development of the relationship that exists between a charge of discrimination filed with the EEOC and the jurisdiction of a federal court to entertain a subsequent Title VII suit that arises out of the original charge. *Id.* at 4. Relying on *Falcon v. General Telephone Co.*, 626 F.2d 369 (5th Cir. 1980), vacated on other grounds, _____U.S._____, 101 S.Ct. 170 (1981), parts I, II, IV, V, and VI of Original Opinion reinstated_____F.2d _____, (5th Cir. June 24, 1981) (Slip Op. 8949); *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678 (5th Cir. 1975), and *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970), the district court concluded that it did not have jurisdiction over Title VII class action claims that

were not presented to the EEOC nor investigated by the EEOC and found to have some merit.

While I agree with the rationale and the result in *Fellows*, I am reluctant to decide the jurisdictional issue in this case in view of the limited evidence in the record relating to the scope of the investigation conducted by the administrative authorities. Further, the exact question presented in *Fellows* has yet to be responded to by the Fifth Circuit. Although not specifically articulated by the Plaintiff, it is assumed that the class action claims based on 42 U.S.C. §§ 1981, 1983, are still being advocated and those claims would not be jurisdictionally barred under *Fellows*. *Hill v. American Airlines, Inc.*, 479 F.2d 1057, 1060 (5th Cir. 1973).

RULE 23(a): PREREQUISITES TO A CLASS ACTION

The following provisions of Rule 23 of the Federal Rules of Civil Procedure must be met:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . . .
>
> (2) the party opposing the class has acted or refused to

act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .

An analysis of the Rule 23(a) prerequisites as they apply to this case necessitates an early resolution of the following issue: Should this court allow a person that was formerly employed under the provisions of a state civil service statute to represent the claims of employees not subject to the state civil service statute in a class action alleging across the board discrimination? No member of the class of employees not subject to civil service is a party to this action.

During her tenure as a dispatcher for the City of Marshall Police Department, all policemen and firemen employed by the City were subject to the laws of the State of Texas providing for the creation of a Firemen's and Policemen's Civil Service in all Texas cities having at least 10,000 inhabitants. TEX. REV. CIV. STAT. ANN. art. 1269m (Vernon 1963 & Supp. 1980-81) (hereinafter art. 1269m). Section 16a of art. 1269m states that the purpose of the statute "is to secure to the cities affected thereby efficient police and fire departments, composed of capable personnel, free from political influence, and with permanent tenure of employment as public servants." Article 1269m controls and regulates the hiring, promotion, supervision, demotion and discipline of policemen and firemen in cities subject to the Act. Pursuant to this statute, the City of Marshall has adopted rules and regulations for the administration of Civil Service for Firemen and Policemen in the City of Marshall. *See* City of Marshall Ordinance 0-64-5 (March 26, 1964), as amended by Ordinance 0-79-29 (July 26, 1979).

The statute and regulations provide a very detailed framework under which most of the essential employment policies of the Police Department are controlled. Persons employed

by the City of Marshall in any of its 13 other departments are not subject to the proscriptions of the Civil Service laws and regulations. This distinction is significant for the purposes of determining whether the Plaintiff should be allowed to maintain this suit as a class action. While this Court is bound to accept the principle that her claims of racial discrimination might be typical of those of all black employees of the City of Marshall, *see Falcon v. General Telephone Co.*, supra, 626 F.2d at 375 (5th Circuit still approves "across the board" attacks on discrimination), it does not necessarily follow that adjudication of her claim will involve questions of law or fact common to the claims asserted on behalf of the non-civil service employees. Rule 23(a)(2), Fed.R.Civ.P.

For example, a person seeking a position of employment with the Police Department must complete an application for employment, must take a competitive examination administered by the Civil Service Commission, must pass a physical examination and is subject to other age and physical requirements as set by the Commission. Art. 1269m, §§9,13[2]. Section 10 of art. 1269m provides that the persons having the highest grade on the eligibility list shall be appointed to a vacant position unless there is a valid reason why the person holding the next highest grade should be appointed. Thus, the testing process is an integral part of the process of filling vacancies in the Marshall Police Department. Validation of employment tests, especially in the field of civil service employees, presents many unique and complex questions. *See Guardians Association of New York City P.D. v. Civil Service Commission*, 633 F.2d 232 (2nd Cir. 1980); *Guardians Association of New York City P.D. v. Civil Ser-*

2 The Fifth Circuit recognized the significance of dissimilar hiring procedures when it affirmed the district court's decision to limit class certification to persons employed at a particular location. *Falcon v. General Telephone Co.*, supra, 626 F.2d at 376.

vice Commission, 630 F.2d 79 (2nd Cir. 1980).

Moreover, once a person is employed by the Marshall Police Department, any subsequent promotions (§§14,14A), suspensions (§§15, 17, 18, 20), or demotions (§19) are controlled by statute.

These and other factors persuade the court to limit the class of persons that the Plaintiff should be allowed to represent to only those persons who are employed by the Marshall Police or Fire Department, persons who have been terminated from those departments, and persons that applied for employment in those departments.

An examination of the relevant class of black employees of the City of Marshall subject to the Civil Service laws of Texas reveals that during the years 1977, 1978, 1979, and 1980, a maximum of eight blacks were employed by the City in the police and fire protection categories. There was no evidence introducted to indicate the number of blacks, if any, that filed applications to take examinations for Fireman or Policeman in accordance with §1 of the City of Marshall's Rules and Regulations for Civil Service for Firemen and Policemen, as amended. In this Court's opinion, the Plaintiff has failed to demonstrate that the class of black applicants and employees is so numerous that joinder of all members is impracticable. Rule 23(a)(1), Fed. R. Civ. P.

Because of the findings above that two of the prerequisites to a class action have not been satisfied, it need not be determined whether the Plaintiff will fairly and adequately protect the interests of the class.

In accordance with the foregoing opinion, it is ORDERED that the Plaintiff's Motion for Declaration of a Class Action be and hereby is DENIED.

SIGNED this 14th day of September, 1981.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILMA EVERITT, et al	)	
	)	
VS.	)	NO. M-79-219-CA
	)	
THE CITY OF MARSHALL, et al	)	

ORDER DENYING PLAINTIFF'S SECOND MOTION FOR CLASS CERTIFICATION

Came on to be heard Plaintiff's Second Motion for Class Certification and after consideration of the same, it is ORDERED that Plaintiff's Second Motion for Class Certification be and hereby is DENIED.

SIGNED THIS 17 day of November, 1981.

/s/ WILLIAM M. STEGER
United States District Judge